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No. 84-897

IN THE
Supreme Court of the United States
October Term, 1984

FRED TESCH, *et al.*,
Petitioners,

vs.

ROBERT E. McCURRY, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Respondents do not believe that any questions raised by petitioners merit review by this Court. In compliance with Rule 34.1(a) and 22.1, the following would be a more accurate statement of the questions presented for review:

1. Did the Court of Appeals err by holding that a Nebraska state court order directing the closure of a Christian school, did not authorize a police raid on a church worship service?

2. Are law enforcement officers, who are not acting pursuant to a court order, immune from suit for civil rights violations under 42 U.S.C. 1983 when they raid a church worship service, forcibly evict worshipers and padlock the church?

Other issues raised by petitioners are discussed in argument.

PARTIES

The petitioners correctly list the parties in their Petition for Certiorari at ii. Counsel for Respondents represents all of the respondents.

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STATEMENT OF THE CASE

On Monday morning October 18, 1982, petitioners conducted an early morning raid on a church worship service at Faith Baptist Church in Louisville, Nebraska. Respondents were engaged in prayer, singing of hymns, preaching and worship.

Petitioners Tesch, Shelbourn, and Syslo claimed to be enforcing a court order directing the closure of a Christian school. The order directed the padlocking of the building with the explicit direction that the sheriff was to "prohibit the operation of a non-approved school." Pet. for Cert. at 4a. But the state judge had expressly directed the sheriff to

ensure that the building was open for worship services at certain designated times and at "such other times as the building shall be used for the holding of church services." Appendix B at 6a.

There is no claim by petitioners that anything other than a church service was in progress at the time of their predawn raid.

Petitioners and their deputies and state troopers forcibly evicted all of the worshipers and padlocked the building.

On December 13, 1982, respondents filed this action in the U.S. District Court for the District of Nebraska. The complaint sought damages against the police officer defendants and declaratory and injunctive relief against the police officers and defendants Moravec and Douglas, the County Prosecutor and State Attorney General, respectively.

The District Court granted petitioners' motion to dismiss on July 28, 1983. The central ruling was that the petitioners were doing nothing more than required of them by the state court orders when they raided the church service. Since they were enforcing a state court order, the District Court held, the law enforcement officers were entitled to absolute immunity from suit under 42 U.S.C. 1983. The claim for prospective equitable relief was denied under the doctrine of abstention under *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

The Eighth Circuit Court of Appeals reversed the District Court on June 29, 1984. The Court of Appeals held that the state court orders did not direct the law enforcement officers to raid the church service and therefore reliance on the doctrine of absolute quasi-judicial immunity was misplaced. The Court held that the raid on the

church service violated the respondents' rights to free exercise of religion under the First Amendment.

The Court of Appeals ruled further that since the state court did not order the raid on the church service, *Younger* v. *Harris, supra,* did not require abstention since there was no interference in an ongoing state proceeding.

SUMMARY OF ARGUMENT

1. Petitioners' case is founded upon a misreading of the Court of Appeals decision. They claim that the Court of Appeals reviewed the constitutionality of the state court orders and found them wanting. In reality, the Court of Appeals did nothing more than rule that the state court orders did not authorize the raid on the church service. It was the petitioners' interpretation of those orders which the Court of Appeals said would be unconstitutional. Therefore, petitioners' arguments concerning improper review of a state court order are based upon a false premise.

2. The Court of Appeals clearly made a correct interpretation of the state court orders which directed the sheriff to open and close the church for the purpose of closing the school while permitting church services at any time.

3. The petitioners claim that the Court of Appeals has "*sub silento*" permitted respondents to sue the prosecuting attorney and attorney general for damages. The clear record is that we have only sued the attorney defendants for declaratory and injunctive relief.

4. Petitioners raise a confused question for the first time in this court that there is not a "case of controversy" presented by this case. The claim for damages obviously

satisfies the Article III requirement and the equitable relief was properly granted by the Court of Appeals.

5. The Court of Appeals did not err by granting a declaratory judgment in favor of respondents. There are no material facts in dispute and there were no procedural irregularities justifying a reversal.

6. The District Court dismissed Cass County as a defendant for failure to plead more than the county's name. The Court of Appeals did not address this issue, but simply remanded for further proceedings consistent with their opinion. At most, respondents have gained an opportunity to amend their pleadings as to the county.

I. Petitioners Patently Mischaracterize the Decision of the Court of Appeals.

The linchpin of petitioners' argument is a deliberate and repeated mischaracterization of the opinion of the Eighth Circuit Court of Appeals in this case. The petitioners assert, for example:

> the Court of Appeals absolutely lacked jurisdiction to review and determine the constitutionality of that order. [The state court order of October 14, 1982.] Only this Court could review that order and then only after it had been reviewed by the Nebraska Supreme Court. . . . Thus, the Court of Appeals erred when it undertook to review the state district court's order of October 14, 1982.
>
> —Petition for Certiorari at 26.[1]

The Court of Appeals did not "review" the state court orders in the sense that term is used by petitioners. Neither

[1]Hereinafter referred to as Pet. for Cert.

did it determine the constitutionality of the state court's order. The Court of Appeals did nothing more than rule that the language of the state court order did not authorize a police raid on a church worship service. The Court of Appeals ruled that *petitioners' interpretation* of the state court order would render such order unconstitutional and therefore rejected their interpretation. Rejecting the petitioners' interpretation of an order on constitutional grounds is not the same as a direct "review" of the state court order. The Court of Appeals held that the petitioners' *actions* were unconstitutional, it did not hold that the state court proceedings were unconstitutional.

The only reason that the state court orders were even before the federal courts is because the *petitioners* placed them in issue. Neither the original nor amended complaint in this case ever alleged that the state court orders were unconstitutional. These complaints simply alleged that the petitioners violated the respondents' civil rights by making a police raid on a church worship service. The petitioners then raised the state court orders as an affirmative defense. They argued that the police officers were merely carrying out a court order and were therefore clothed with quasi-judicial immunity.

The question that was then before the federal courts as a result of the petitioners' own pleadings was: Did the state court orders authorize the police raid on a church worship service? The petitioners advanced one line of interpretation. The respondents countered with another interpretation of these orders, arguing that the orders did not authorize the police raid and arguing further that the interpretation advanced by the respondents would result in an unconstitutional interpretation. Therefore, respondents argued, faced with two conflicting interpretations, the duty of the federal courts was to construe the state court

orders in such a way as to avoid an unconstitutional reading of the state court orders.

The Court of Appeals made its position clear when it said, concerning the petitioners' arguments:

> We rejected these arguments. We hold that the state-court orders did not authorize the law-enforcement officers' action here. If the orders are ambiguous, they should be construed against the authority asserted by the state, because orders conferring such authority would be unconstitutional. Thus, there is no ground for the application of absolute "quasi-judicial immunity" . . . .
>
> —Pet. for Cert., Appendix 31a.

Thus the characterization by petitioners that the decision of the Court of Appeals is a bizarre, novel intrusion of the federal judiciary into the state judicial domain, is patently false.

The Court of Appeals did not invalidate a state court order. The Court of Appeals did not enjoin a state court proceeding. The Court of Appeals did not permit a civil rights suit against police officers who were merely enforcing a court order.

Rather, the Court of Appeals made an unsurprising ruling that police officers who violate the civil rights of citizens are subject to suit under 42 U.S.C. 1983 if the police officers' actions are not authorized by the court order they are purportedly enforcing.

This Court need not review such a ruling. It is clearly a correct statement of the law. See, e.g., *United States* v. *Murrie,* 536 F.2d 695 (6th Cir. 1976).

II. The Court of Appeals Made the Correct Interpretation of the State Court Orders.

As a result of the petitioners' mischaracterization of the decision of the Court of Appeals, they have consequently misstated the issues which are potentially before this Court.

The central issue is nothing more than whether or not the Court of Appeals correctly interpreted the state court orders. This is hardly a novel or important federal question. No new principles of interpretation are at stake. This Court has previously established clear rules that state court orders which affect First Amendment freedoms must be strictly construed in favor of those freedoms. *Carroll* v. *President and Commissioners of Princess Anne County,* 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968). It is beyond dispute that orders must be construed in accordance with the plain language of such orders. Finally, this Court has also established the rule that if court orders are capable of two interpretations, one of which would lead to an unconstitutional result, the constitutional result must be chosen. *Regional Rail Reorganization Case,* 419 U.S. 102, 95 SCt. 335, 42 L.Ed. 2d 320 (1974); *Graham* v. *Richardson,* 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed. 2d 534 (1971).

By application of these three rules of construction, it is beyond legitimate dispute that the Court of Appeals made the correct interpretation of the state court order.

The state court order of October 14, 1982's, operative language provided:

> IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the Order of this Court entered September 11, 1981, shall be reinstated, the Sheriff of Cass County

> and his enforcement personnel to enforce the Order of this Court prohibiting the operation of a non-approved school, the first enforcement thereof to be exercised Monday, October 18, 1982; it being the intent of the Court that the parents of children attending thereat shall have advance notice of the action taken by the Court.
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> —Pet. for Cert, App. at 4a.

There are three specific items which were established by this order. First, the operative effect was to reinstate the prior order of September 11, 1981. Therefore, it is both appropriate and necessary to consider, as the Court of Appeals did, the language of the September 11, 1981, order to interpret the Court's instructions to the sheriff. Second, the sheriff was ordered to "prohibit. . . the operation of a non-approved school." Nothing in this order directs or requires raids on worship services. Third, it was the Court's intention that the parents of the children would receive notice. This aspect of the order does not come into play in this case.

The order of September 11, 1982, provided two crucial directions to the sheriff to guide his actions at the church. First the state judge directed:

> The building is to be unlocked Saturday and Sunday and *such other times as the building shall be used for the holding of church services.* [Emphasis added.]
>
> Appendix B, at 6a.

The state judge also direct the sheriff with the following language as to the purposes for which he was to open and close the church:

> The sheriff is further authorized to designate [sic] authority to his deputies or other for the patrolling and or *opening and closing of the*

building for the purposes indicated. [Emphasis added.]
Appendix B at 6a.

The petitioner complain that they should have been allowed to have the judge testify as to his intent[2], apparently so he could clear up the confusion. Yet at another point petitioners accuse the Court of Appeals of failing to follow the clear intent of the state court as expressed in its orders.[3]

It seems apparent that the petitioners have difficulty in facing the reality of the plain language above-quoted. There is no question of lack of clarity. The church was to be "opened and closed for the purposes indicated." The church was to be closed when it was used as an uncertified school. Both orders specificially directed that the church was to be opened when used for religious worship. If the sheriff was required to adhere to a strict time-table as the petitioners argue, then the order would have read: "the church is to be opened and closed at the *times* indicated."

The September 11, 1981 order's language that the building was to be unlocked at "such other times as the building shall be used for the holding of church services" is unambiguous.

The petitioners argue that the order of October 20, 1982, is evidence that their interpretation of the prior orders was the correct one. It should be noted that the Court of Appeals never received the benefit of this argument from the petitioners. They raise it here for the first time. Nonetheless, the fact that the state court opened the church when it became apparent that there was going to be a prayer meeting cuts against petitioners.

[2]See Pet. for Cert. at 27.

[3]See Pet. for Cert. at 26.

This case arises because the sheriff conducted a raid on a church service on a Monday morning. He argues that this was what the schedule demanded. He argues that the state judge intended that the time schedule be strictly adhered to. Then, in an seeming inconsistency, he argues that the fact that the judge permitted a prayer meeting on Wednesday afternoon proves his point.

If the schedule was to control, why did the judge permit an exception? The October 20 order proves, it would seem to us, that the judge wanted to permit religious services at any time, it being his sole intent to close the school. The petitioners are not clear in their reasoning on this point. If anything, they have raised a new argument which proves that the judge would have precluded the sheriff from raiding the Monday worship service if the question had been directly presented to him.

There can be no question that there is a constitutional right to worship in church protected by the First Amendment. *Murdock* v. *Pennsylvania,* 319 U.S. 105, 109, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Neither is there any question that it is unconstitutional to impose a prior restraint on religion. *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). If a church is required to seek a court's permission to hold a midweek service this is clearly an unconstitutional prior restraint. Yet, the petitioners unashamedly asserted such a position below, including admissions in oral argument that they believed that it was appropriate for a church to be required to get a judge's permission to hold a Good Friday service.[4]

The Court of Appeals correctly interpreted the state court orders. If there was any doubt, the Eighth Circuit

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[4]See Pet. for Cert., Appendix F at 31a.

correctly gave the benefit of such doubt to those asserting the First Amendment freedom.

We would respectfully suggest that although the fact that a sheriff raided a church service and forcibly evicted worshipers is a novel factual situation, at least in the United States, there is nothing in the interpretation of the state court orders which is either erroneous or which raises the kind of important and novel federal questions which this Court demands in granting petitions for certiorari.

III. Petitioners' Claim that the Court of Appeals' Decision Permits Respondents to Seek Damages Against the Prosectuor and State Attorney is False and Frivolous.

In the first amended complaint the first paragraph of the prayer for relief (which is the only paragraph addressing the issue of money damages), the following is sought:

> For damages as alleged above for violation of their rights under the Constitution of the United States in such amount as shall be proven at trial, but not less than one million dollars . . . for each of said plaintiffs, *against defendants TESCH, SHELBOURN and SYSLO.* [Emphasis supplied.]

All other requests for relief are sought against "all defendants."

Tesch, Shelbourn, and Syslo are the law enforcement officers. Douglas and Moravec are the State Attorney General and the County Prosecutor, respectively. The complaint makes it absolutely clear that we were not seeking damages against the prosecuting attorney or the attorney general. In our briefs at all levels, we have

repeatedly acknowledged this fact and have never changed our position.[5]

Therefore, it appears to us that when petitioners allege that the Court of Appeals has "apparently reversed *sub silento* the District Court's dismissal of the claims for damages, declaratory and injunctive relief against Douglas and Moravec"[6] the petitioners are pursuing ghosts. We are *not* suing these attorney defendants for damages. We never have sued them for damages. The Court of Appeals has done nothing to the contrary. How can the Eighth Circuit *sub silento* reverse the District Court on an issue we have not even raised?

The law is clear that judges and prosecutors may be sued under 42 U.S.C. 1983 for declaratory and injunctive relief. *Pulliam* v. *Allen,* ____ U.S. ____, 104 S.Ct. ____, 80 L.Ed.2d 565 (1984); *Gerstein* v. *Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). That is all we have done.

The petitioners appear to be grasping at non-existent straws to find some basis for review.

IV. Petitioners Raise for the First Time in This Court Confused Issues Concerning a Supposed Lack of Case and Controversy.

First of all, it should be noted that there can be no legitimate question raised about the existence of a "case or controversy" as it pertains to the damages aspect of this case. The respondents have sued for damages for civil

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[5]See, e.g., petitioners' acknowledgement of this fact in our brief before the federal District Court, Pet. for Cert. at 19.

[6]Pet. for Cert. at 19-20.

rights violations when they were forcibly removed from a church worship service on October 18, 1982. There is nothing abstract about such a claim. It is a justiciable case and controversy and it is clear that those who were evicted have standing to press such a suit.

The petitioners argue that we have failed to allege the prospect of any likelihood of future raids or padlockings. The first amended complaint alleged the following:

> 87. Defendant TESCH has made statement in the press and otherwise that it is his desire that the church be padlocked permanently. Plaintiffs allege on information and belief that there is a substantial threat of unlawful violence and force by defendant TESCH and those acting under his direction and control, including but not limited to: tear gassing of worshipers and other violent alternatives. Plaintiffs believe that said defendant will carry out such threats unless he is restrained by the Court from doing so.
>
> 88. Plaintiffs that defendants will continue to perform acts in violation of plaintiffs' constitutional rights unless and until a permanent injunction is issued restraining them from padlocking the church and from otherwise interfering with the constitutional rights of plaintiffs and other worshipers.

The whole line of argument that the October 20, 1982 order, which terminated the padlocking, results in a lack of case or controversy is raised by petitioners for the first time in this Court. Suffice it to say that the first padlocking order was made on September 11, 1981. It was reinstated on October 14, 1982. There is nothing which will prevent the petitioners from seeking its renewal once again. If they obtain another order to close the school,

they would again claim the right to raid another worship service to effectuate that order, unless, of course, the federal courts prohibit their misconduct allegedly required by the state court orders.

The only arguable point which petitioners raise relative to the issue of "case or controversy" is that Nebraska has passed a new law regarding private schools. The petitioners note that the Nebraska Legislature amended the private school law that was the genesis of this entire legal controversy. Therefore, although not stated in this way by petitioners, they raise a potential question of mootness. However, petitioners failed to inform this Court that this law was passed subsequently to oral argument and became effective subsequent to the decision of the Court of Appeals.[7] Petitioners never raised this mootness argument in either court below, nor did they raise this issue in their motion for rehearing before the Eighth Circuit.

Interestingly, or perhaps ominously, the petitioners argue, at another point in their petition that enforcement proceedings are still looming in the state courts despite this new law.[8] Petitioners claim that these ongoing proceedings require the federal courts to abstain from issuing declaratory or injunctive relief. If there is a case or controversy still alive which might give rise to the abstention doctrine, how then can there be no case or controversy for the purposes of justiciability or mootness?

As long as petitioners claim the right to enforce their prior decrees, and as long as they claim that their raid on

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[7]This law, L.B. 928, now Neb. Rev. Stat. 79-1701 (Supp. 1984) was passed on April 5, 1984 and became effective on July 10, 1984. This case was argued on February 17, 1984 and decided on June 29, 1984.

[8]Pet. for Cert. at 22.

the church was legally justified, this case is alive.[9]

In any event this case was not moot at the time the Court of Appeals entered its decision. The damages portion of the case is clearly justiciable and has not become

V. The Court of Appeals Was Justified in Issuing A Declaratory Judgment Against Petitioners.

The petitioners moved for judgment of dismissal on the pleadings in the District Court. They introduced affidavits in support of their motions. They clearly relied on the state court orders in support of their motions. They even annexed newspaper articles to their motions and relied on statements therein for proof of certain "facts."

It is axiomatic that if a party moves for judgment on the pleadings, and then presents materials outside the pleadings the motion may be properly considered a motion for summary judgment. *Carter* v. *Stanton,* 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972). Further, it is clear that one moving for summary judgment may have summary judgment entered against him even if there is no cross motion, so long as there is no triable issue of fact. *Proctor & Gamble Ind. Union* v. *Proctor & Gamble Manufacturing*

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[9]The citation of *In re Liles,* 217 Neb. 414, 349 N.W.2d 377 (1984) by petitioners as an example of pending enforcement proceedings is curious. Lead counsel for both parties in this case were also lead counsel in *In re Liles.* That case involved the jailing of seven fathers of children who attended Faith Baptist School when they invoked the Fifth Amendment in a subsequent contempt proceeding. These fathers were released from jail on February 23, 1984 after spending 93 days in jail for invoking the Fifth Amendment. The *Liles* case may shock the conscience, but it is not proof of the proposition that there are ongoing contempt proceedings that are subsequent to the new law. Counsel is aware of such proceedings against others, but not against those involved in the *Liles* case.

Co., 312 F.2d 181, 190 (2d Cir. 1962). All of the material facts of this case are beyond dispute. The fact of the raid, the content of the court orders, the identity and acts of the parties are conceded by both sides.

Petitioners' assertion that the Court of Appeals entry of a declaratory judgment was a novel unwarranted move justifying the exercise of this Court's supervisory powers[10] is frivolous. The Court of Appeals has done nothing more than enter a summary judgment against the party seeking such a judgment.

Petitioners cry "foul" pointing to five items which they claim were included in the opinion of the Court of Appeals which cannot be found in the designated record.[11] Petitioners argue that the failure to include these facts in the designated record require the judgment of the Court of Appeals to be vacated.[12]

Petitioners correctly assert that these facts can be found in our brief in the Court of Appeals.[13] However, petitioners fail to raise any issue at the appellate level over the inclusion of these facts in that brief. Once again, they raise this issue for the first time in this Court.

Before briefly reviewing each of the supposed omissions we note that all of these facts were in the record in the District Court. Contrary to petitioners' assertion, most of them were in the designated record on appeal as we will demonstrate. One affidavit which was before the District Court contains the remainder of the facts in question. Had the petitioners raised this issue in the Court of Appeals, we

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[10]Pet. for Cert. at i, Question 6.

[11]See Pet. for Cert. at 28.

[12]Pet. for Cert. at 28-29.

[13]Pet. for Cert. at 29.

would have had an opportunity to move to amend the designated record to add the affidavit. Finally, none of the facts are crucial to the judgment of the Court of Appeals.

The first of these disputed items concerns the statement that "the sheriff arrived at the building 'with fifteen carloads of desputies and state troopers." In their brief in the Court of Appeals, the petitioners admit that "the Cass County Sheriff and his deputies, along with Nebraska State Patrol troopers . . . arrived at the Faith Christian School . . ."[14] The first amended complaint which was part of the designated record, alleged that "numerous uniformed and armed Cass County deputy sheriffs and troopers of the Nebraska State Patrol" conducted the raid on the church. The only issue which is even possibly in dispute is whether or not there were actually fifteen carloads of deputies and troopers. This fact is found in the affidavit of Lester Spear which was before the District Court. This affidavit is attached as Appendix A.

The difference between "numerous" law enforcement officers and "fifteen carloads" of law enforcement officers is hardly the kind of issue which could result in the reversal of a summary judgment, not to mention the fact it is not the kind of trivia this Court usually deals with.

The second of these "facts" was the statement that the "plaintiffs 'were conducting a prayer vigil.' "[15] This fact was before the Court of Appeals in paragraph 77 of the first amended complaint which was part of the appellate designated record.

Likewise the third "fact" that "the plaintiffs were 'singing, preaching, reading the Bible, praying, and so forth, to

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[14]Brief of Appellees at 8.

[15]Pet. for Cert. at 28.

protest the jailing of Mr. Sileven and the closing of the school' "[16] is found in paragraph 77 of the first amended complaint.

The fourth fact is "no school children were present." This fact is found in the affidavit of Dale Spear, paragraph 7. Likewise the fifth fact "no classes were being held" is found in the same paragraph of the Spear affidavit.

There is no real dispute as to these matters. Petitioners have shown nothing in the record to the contrary. At most they have shown that through oversight one affidavit was neglected to be placed in the designated record on appeal. Given the fact that this is raised for the first time in this Court, it does not give rise to a question of the nature or importance which invokes this Court's "supervisory jurisdiction."

Petitioners are asking this Court to become embroiled in minutia when it raises such minor matters in this Court.

VI. There is no Legitimate Argument Concerning the Presence of Cass County as a Defendant.

Respondents concede that the first amended complaint alleges nothing more than the name of Cass County. We will further concede that this is insufficient to hold Cass County liable in any portion of this case.

However, this still gives no basis for review by this Court of the decision of the Court of Appeals.

The Court of Appeals simply did not address the issue of Cass County as a defendant. It remanded the case to the

[16]Pet. for Cert. at 28.

District Court for proceedings consistent with the Court's decision. There would be nothing inconsistent with that opinion if the District Court renewed its dismissal of Cass County as a party.

The net result of the Court of Appeals decision does nothing more than give the respondents an opportunity to amend its pleadings as to Cass County. Once this case is remanded to the District Court for trial, we will move to amend the pleadings against Cass County to conform to the standard of this Court in *Monell* v. *New York City Dept. of Soc. Serv.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 621 (1978), which establishes the principle of municipal liability under 42 U.S.C. 1983. If the District Court determines our pleading to be insufficient under *Monell,* then it will not be inconsistent with the Court of Appeals decision to dismiss at that point.

This issue is not of major significance. It does not justify review in this court. We were simply cut off from correcting an obvious deficiency in our complaint by the granting of the motion to dismiss on other, more substantial grounds. Undoubtedly the District Court would have given us an opportunity to amend our pleading if this were the only problem it saw in our case.

CONCLUSION

Respondents respectfully suggest that no issues are present in this case which merit review by this Court. The court of appeals has committed no error and no substantial federal questions are raised. We urge the denial of the Petition for a Writ of Certiorari.

Respectfully submitted,

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January 11, 1985

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROBERT E. McCURRY, et al.,	)	Civil
	)	No. 82-L-659
Plaintiffs,	)	
	)	
v.	)	AFFIDAVIT
	)	
FRED TESCH, et al.,	)	
	)	
Defendants.	)	

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCATER)

Comes now Rev. Dale Lester Spear, after being first duly sworn, and deposes and says the following:

1. My name is Dale Lester Spear, and I reside at 2916 Randolph Street, Lincoln, Nebraska 68510. On the morning of October 18, 1982, at 6:00 a.m. and all other times material to this affidavit, I was present at the Faith Baptist Church in Louisville, Cass County, Nebraska.

2. At about 6:00 o'clock a.m. on that morning, I was gathered together with others inside the church sanctuary or area normally used by the church for conducting worship services with approximately eighty or more other people. We were all engaged in a religious service, praying to God, singing and reading the Bible. We were praying for, among other things, Reverend Everett Sileven, pastor of the Faith Baptist Church, and his release from jail. We

were also praying for God to intervene and prevent the school operated by the Faith Baptist Church from being closed by authorities of the state of Nebraska, and to prevent the closing of the Faith Baptist Church.

3. During the course of the services various members of those assembled gave sermons or exhortations which included Biblical preachings and exhortations.

4. Sometime after 6:00 o'clock a.m., but before 6:30 a.m., the church was entered by numerous uniformed Cass County Deputy Sheriffs and members of the Nebraska State Patrol. To the best of my knowledge none of these officers who entered requested or received permission from anyone present to do so.

5. The law enforcement officers completely disrupted the religious service, terminating it by forcibly removing from the church several people who refused to move of their own accord. I was among those individuals forcibly removed because I refused to move of my own accord.

6. When I was taken out of the church by the law enforcement officers, I was placed on the grass lawn immediately adjacent to the church building. I personally observed one or more of the law enforcement officers who were present place a chain and padlock upon the doors of the church. This prohibited us from re-entering the sanctuary to continue our religious service and protest against the actions of the state of Nebraska and its representatives in connection with the operation of the school at the Faith Baptist Church in Louisville, Nebraska, and in terminating our worship and protest service.

7. Once outside the church, I noted what I would estimate to be at least fifteen cars bearing the markings of either the Nebraska State Patrol or the Cass County

Sheriff's Department. During the course of the religious service in which I participated and afterward, there were, to the best of my knowledge, no children present in the Faith Baptist Church building, and preparations for classes were not, to my knowledge, underway.

8. Many of the individuals who were removed from the sanctuary of the Faith Baptist Church refused to do so of their own acccord and were consequently carried or dragged out and placed upon the sidewalk or adjacent areas by the law enforcement officers. I was personally removed by two Nebraska State Patrol officers because I refused to move of my own accord.

9. I am personally afraid and wary to re-enter the Faith Baptist Church at any time for the reason that I may once again be confronted with the humility [sic] or degradation of being forcibly removed by law enforcement officers.

10. The underlying situation remains at loggerheads. The sheriff and the prosecuting attorney have been continuing to maintain surveillance of the church building and have accused the church of again illegally operating the school. The sheriff has personally entered the church on the alleged premise of checking on the operation of the school. The worshipers at the church fear that such searches will again result in attempts to padlock the church or otherwise curtail worship services under the guise of closing the school.

Further affiant saith not.

Dale L. Spear

Subscribed and sworn to before me this 12th day of March, 1983.

/s/ William J. Morris
Notary Public
General Notary - State of Nebraska
WILLIAM J. MORRIS
My Comm. Exp. July 27, 1983

APPENDIX B

IN THE DISTRICT COURT OF
CASS COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel. PAUL L. DOUGLAS, Nebraska Attorney General and RONALD D. MORAVEC, Cass County Attorney,	)	
Plaintiffs,	)	DOCKET 24 PAGE 138
-vs-	)	
FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, A Corporation; FAITH CHRISTIAN SCHOOL, Louisville, Nebraska; EVERETT SILEVEN: EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES: KENNETH HEARD; DAVE CARLSON and WALTER PETERSON,	)	ORDER
Defendants.	)	

Now on this 11th day of September, 1981, the above entitled is before the Court for a further determination of compliance by the defendants with the orders of this Court in the continuation of the Faith Christian School at Louisville, Nebraska.

For the purposes of this hearing, the plaintiff appeared by Ronald D. Moravec, Cass County Attorney, the defendant appearing personally with his counsel, Richard Swenson of Omaha, Nebraska, and Charles Craze of Cleveland, Ohio. Four affidavits were offered and admitted in evidence together with a stipulation of the parties through their counsel; this constituting the evidence in the matter and the evidence being uncontradicted and to the effect

that Faith Christian School still remains open and that uncertified teachers and administrators are teaching secular subjects in violation of the orders of this Court.

The Court thereupon finds that Faith Baptist Church and Reverend Everett Sileven are in contempt of the orders of this Court and that sanctions should be imposed. The Court believes that the desired end would best be reached without the imposition of a fine or incarceration of the defendant, and as a means of enforcing its judgment directs the Sheriff of Cass County to procure and install additional locks on each of the entrances to the church and school, it being one building, and to keep the building secured. The building is to be unlocked Saturday and Sunday and such other times as the building shall be used for the holding of church services.

For these purposes, the sheriff is authorized to purchase the necessary equipment and to hire a craftsman, the charges to be paid by Cass County, Nebraska, and to be taxed as costs in this case against the defendants and each of them.

The sheriff is further authorized to designate authority to his deputies or others for the patrolling and or opening and closing of the building for the purposes indicated.

IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the defendants, Reverend Everett Sileven and Faith Baptist Church, are in contempt of the orders of this Court and that the Sheriff of Cass County shall forthwith secure the building by the placing of locks on each of the entrances to the church; the building to be opened on Saturday, Sunday and Wednesday evenings for the singular purpose of religious services.

IT IS FURTHER ORDERED, ADJUDGED AND CONSIDERED by the Court that a certified copy of this Order be forwarded to the Sheriff of Cass County, Nebraska, as authority to carry out the mandates of this Court.

Dated this 11th day of September, 1981.

BY THE COURT:

/s/ Raymond J. Case
District Judge